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Supreme Court of the United States

October Term, 1940

No. 661

FORD MOTOR COMPANY,
Petitioner,

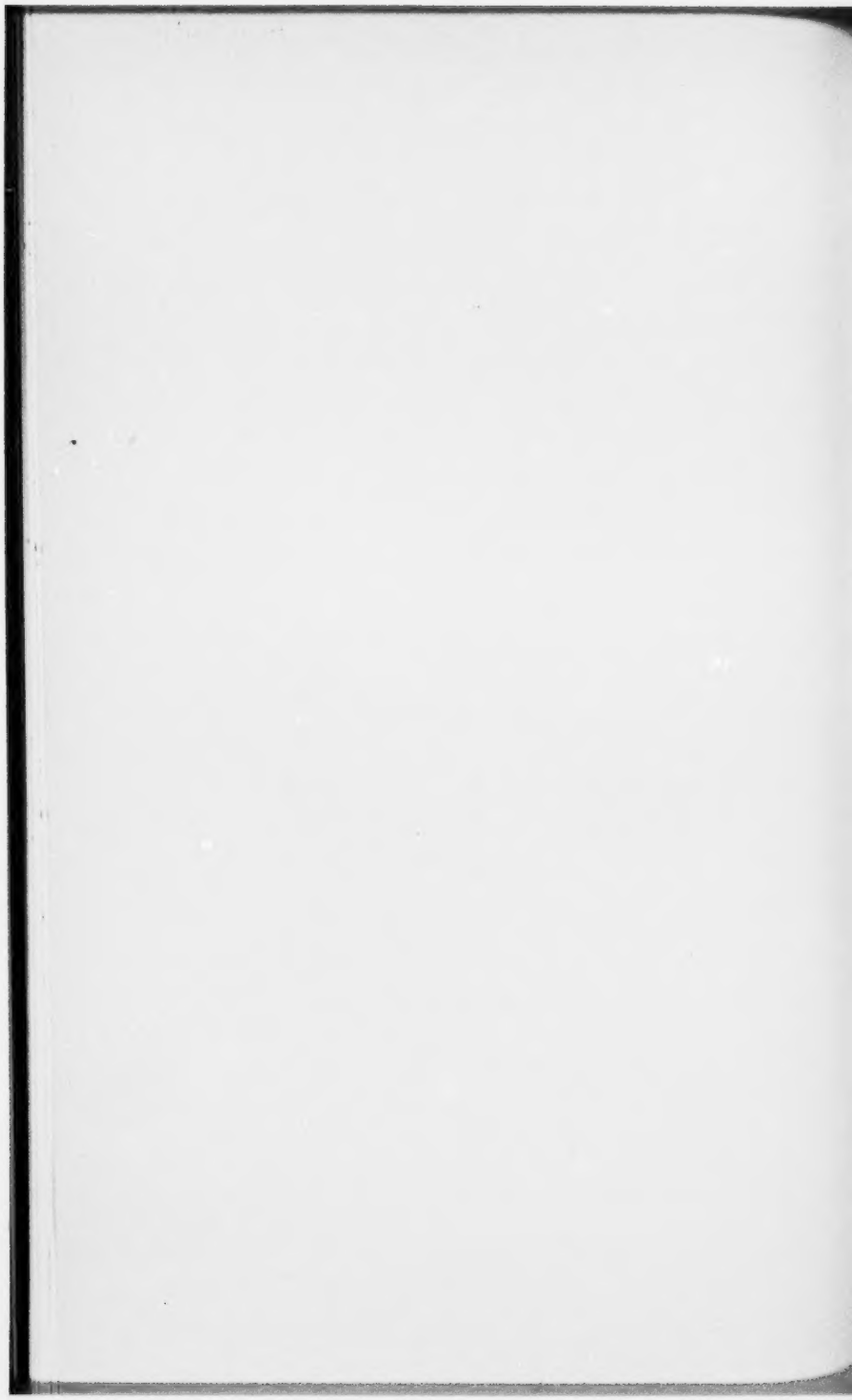
against

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

FREDERICK H. WOOD,
ALFRED MCCORMACK,
Attorneys for Petitioner,
Ford Motor Company.

I. A. CAPIZZI,
HARMON DUNCOMBE,
Of Counsel.



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Supreme Court of the United States

October Term, 1940

FORD MOTOR COMPANY,
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against
NATIONAL LABOR RELATIONS BOARD
No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Ford Motor Company, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review paragraphs 1 and 5 of a decree entered October 8, 1940 (R. Vol. VI, p. 629), by said court denying certain motions and petitions (described below) and enforcing, as modified, an order of the National Labor Relations Board (hereinafter referred to as the Board), dated August 9, 1939, which directed petitioner to cease and desist from certain alleged unfair labor practices under the National Labor Relations Act (49 Stat. 449) (hereinafter referred to as the Act) and to take certain affirmative action.

OPINIONS BELOW

The decision and order of the Board (R. Vol. V, p. 283) was issued on August 9, 1939, and appears in 14

N. L. R. B. 346. The opinion of the Circuit Court of Appeals (R. Vol. VI, p. 611) was handed down on October 8, 1940, and is reported at 114 F. (2d) 905.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938), 28 U. S. C. §347(a), and Section 10(e) of the Act. The decree of the Circuit Court of Appeals for the Sixth Circuit to be reviewed was entered on October 8, 1940 (R. Vol. VI, p. 629).[1] A petition for rehearing was denied on December 2, 1940 (R. Vol. VI, p. 648).

STATEMENT

This proceeding is before the Court for the second time. In *Ford Motor Company* v. *N. L. R. B.*, 305 U. S. 364, this Court affirmed an order of the court below remanding the proceeding to the Board, upon motion of the Board, in order that the Board might set aside an order issued by it against petitioner on December 23, 1937, issue proposed findings and make its decision and order upon a reconsideration of the entire case.

After the remand, the Board set aside its first decision (R. Vol. V, p. 5), issued a proposed decision (*id.*, p. 7), permitted petitioner to file exceptions and a brief and to argue orally (*id.*, pp. 86, 273, 275), denied various motions

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[1]On December 5, 1940, the court below modified its decree to accord with this Court's decision in *Republic Steel Corp.* v. *N. L. R. B.*, decided November 12, 1940, with respect to work-relief funds (R. Vol. VI, p. 648).

of petitioner (*id.*, pp. 84, 269, 282), and on August 9, 1939, issued a second decision and order against petitioner, in which it concluded that petitioner had engaged in unfair labor practices within the meaning of Sections 8(1) and 8(3) of the Act (*id.*, p. 283).

The Board found that petitioner had engaged in unfair labor practices with respect to (1) assaults on U. A. W.[1] organizers by certain employees of petitioner on May 26 and May 27, 1937; (2) the distribution by petitioner in April and May, 1937, of two pamphlets which criticized and disparaged labor organizations; (3) the circulation, on or about June 1, 1937, of a so-called "Vote of Confidence" in petitioner's River Rouge plant in Dearborn, Michigan, and the publicizing thereof; and (4) the discharge between February and June, 1937, of 24 out of the 80,000 employees at petitioner's River Rouge and Highland Park plants because of their U. A. W. membership, activities or sympathy. Its order directed petitioner to cease and desist, to post notices, and to reinstate the 24 employees with back pay (R. Vol. V, pp. 357-359).

The Board petitioned the court below for enforcement of its second order (R. Vol. VI, p. 365). Petitioner by answer and cross-petition challenged the validity of the order for errors of law, for lack of the requisite evidentiary support for its findings, and for failure to accord petitioner the full and fair hearing required by the Act and due process of law (R. Vol. VI, p. 373).

The court below held that the distribution of the pamphlets did not constitute an unfair labor practice and set aside the portion of the Board's order based thereon; con-

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[1]United Automobile Workers of America (C. I. O.), the complaining union.

cluded that the Board's findings as to one of the twenty-four men were not supported by evidence and modified the order of reinstatement accordingly; modified the provisions of the order relating to back pay to accord with the decision of this Court in *Republic Steel Corp.* v. *N. L. R. B., supra,* with respect to work-relief funds; and, except as thus set aside and modified, decreed enforcement of the Board's order (R. Vol. VI, p. 629).

1. All of the events dealt with in the Board's decision took place between February and June, 1937, during and shortly after the spectacular U. A. W. sit-down strikes at the General Motors and Chrysler automobile plants in Michigan from December, 1936, to April, 1937.[1] Those strikes and repeated public threats of U. A. W. and C. I. O. leaders during and after them presaged a like violent and lawless seizure of petitioner's plant,[2] and those strikes as well as others in Michigan during this "greatest industrial conflict of all time"[3] demonstrated, as the court below recognized (R. Vol. VI, p. 618), that a small minority of employees could, with the aid of invaders from outside, forcibly take control of an industrial plant, with resultant stoppage of production and unemployment for all employees, and that regular law enforcement agencies would be unwilling to take the drastic measures necessary to evict the sit-downers.[4]

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[1]R. Vol. VI, p. 618; see also *id.* pp. 430-435.

[2]R. Vol. VI, pp. 618-619; see also *id.* pp. 432-434.

[3]The court below pointed out that the sit-down strikes in the automobile industry were so described by the then Governor of Michigan, now Mr. Justice Murphy (R. Vol. VI, p. 618; see The New York Times, Jan. 12, 1940, p. 1).

[4]These characteristics of the sit-down strikes were graphically portrayed in this Court's decision in *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 482.

The court below took cognizance of these facts in its opinion and stated that petitioner "had reason to fear that there would be an attempt to seize the gates of the River Rouge plant and to invade it for the purpose of staging a sit-down strike" (R. Vol. VI, p. 619).[1]

With respect to the discharges, the court below held that upon the conflicting evidence as to the reasons for the discharges[2] it was, regardless of its own opinion as to the weight of the evidence, obliged to accept, as supported by evidence, the Board's findings as to 23 of the men that they were discharged because of their U.A.W. membership or activities (R. Vol. VI, p. 627). The court disregarded petitioner's contention that, even if the Board's findings were thus accepted, as a matter of law the discharges were not an unfair labor practice because an employer may discharge persons belonging to an organization which he has reason to fear will attempt to seize his plant by force and violence. Since the court itself recognized that petitioner did have reason to fear that the U.A.W. would attempt such a seizure of petitioner's plant, its decree enforcing the Board's order as to the 23 men constitutes a holding that it is an unfair labor practice for an employer to discharge

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[1]The threat of a sit-down strike, and the apprehensions of both petitioner and its employees of such a strike, appeared from evidence in the record offered by the Board itself. R. Vol. I, pp. 598, 617-618, 671, 696-697, 702, 713, 728, 740; R. Vol. II, pp. 938-941, 1094-1095; R. Vol. III, p. 2083; Board's exhibits 106-115, R. Vol. IV, pp. 85-103; see also Board's exhibits 96 and 99, filed as original exhibits.

[2]With respect to most of the discharges, the evidence consisted of testimony of the employees that they had been discharged for union membership or activities, and testimony of their foremen that they had been discharged for poor workmanship, fighting, failing to report to work and other misconduct. See R. Vol. V, pp. 324-355.

persons belonging to an organization which is committed to the policy of sit-down strikes and which the employer has reason to fear will attempt to seize his plant by force and violence.

2. The threat of a seizure of petitioner's plant by the U. A. W., the apprehensions thereof by petitioner and of such of its 80,000 employees as were opposed thereto, and the preparations of petitioner to resist invasion from without or seizure from within, were material to all the issues presented, which, as the Board itself recognized,[1] required that inferences as to both evidentiary and ultimate facts be drawn from circumstantial evidence and that conflicting evidence be resolved in the light of all surrounding circumstances. Yet the Board affirmed the Examiner's exclusion of evidence as to such matters,[2] rejected petitioner's offers of proof thereof,[3] denied petitioner's requests for findings thereon,[4] made no reference thereto in its decision,[5] grossly misstated petitioner's contentions so as to conceal their basis in the sit-down strikes,[6] and throughout presented the evi-

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[1]Thus in its decision the Board itself made findings as to the "background" of the alleged unfair labor practices and as to other matters of a circumstantial nature (R. Vol. V, pp. 291-293, 313-314, 322), and the Board expressly based findings as to particular issues upon "the entire record in the case" and "all the evidence in the case" (R. Vol. V, pp. 338, 340, 342, 344).

[2]R. Vol. I, pp. 134-136; pp. 600-601; Vol. V, p. 286.

[3]R. Vol. V, pp. 141-145, 149-247, 269.

[4]R. Vol. V, pp. 96-97, 104.

[5]The words "sit-down strike" appear only once in the Board's decision, in a quotation from certain literature (R. Vol. V, p. 291).

[6]Compare, for example, the fantastic contentions as to the assaults attributed by the Board to petitioner in its second decision (R. Vol. V, p. 317) with respondent's exceptions to the proposed decision (R. Vol. V, pp. 110-112, excep-

dence so as to suggest that any expressions of Mr. Ford or petitioner critical of unions and any preparations by petitioner to use force against the U. A. W. were necessarily directed at lawful union activities, and that any activities of any of petitioner's 80,000 employees indicating opposition to the U. A. W. must have emanated from petitioner rather than from the employees themselves.[1] The Board's action in all these respects can be explained only on the ground that it entertained some erroneous theory as to the facts or as to its duties under the Act which it believed to justify the complete disregard of facts and circumstances which were material to the issues presented.

The court below took judicial notice of the facts thus disregarded by the Board and recognized that they were material to the issues presented.[2] It nevertheless denied petitioner's petition to adduce additional evidence as to such matters and sustained, with modifications, the Board's order,[3] concluding that if the facts erroneously disregarded were taken into consideration there was nevertheless evidence to support the Board's findings.[4]

The court below thus in effect held that, although the Board had itself failed to consider facts and circumstances

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tions 93, 94, 95, 103 and 104; R. Vol. V, pp. 92-93, 95, 96-97, 98, 100, 109-110). Compare, also, R. Vol. V, pp. 291-293, 319-322, with R. Vol. V, pp. 95, 99.

[1] R. Vol. V, pp. 291-293, 309-324.

[2] R. Vol. VI, pp. 617-619.

[3] R. Vol. VI, p. 629; see *id.*, pp. 428-559.

[4] The court's reasoning on the issue of the Board's failure to consider material facts and circumstances required to be considered and refusal to take evidence thereof was not expressly stated, but its opinion considered as a whole seems clearly to have been predicated upon the reasoning stated above.

required to be considered because material to the issues presented and had excluded evidence thereof, and although the court itself had no power to weigh and appraise the evidence in the light of all material facts and circumstances and to reach its own conclusions as to the weight of evidence, the manner of resolving conflicting evidence, and the inferences to be drawn from evidence, nevertheless the findings of the Board should be sustained if supported by evidence within the meaning of Section 10(e) of the Act.

3. With respect to the assaults which a few of petitioner's 80,000 employees committed on May 26, 1937, on U. A. W. organizers (who, while apprehensions of an attempted invasion and seizure of its plant were greatest,[1] visited the gates of petitioner's plant for the ostensible purpose of distributing U. A. W. literature and whose leaders —although having no literature to distribute[2]—mounted the overpass leading to the main gate of the plant[3]), the Board found in its first decision that petitioner had "deliberately planned and carried out" the assaults in order to "crush union organization among its employees" (R. Vol. III, p. 2114).

The Board eliminated such findings from its second decision, made none of a similar nature, and thus sustained petitioner's contentions that such findings were without substantial evidentiary support. In its second decision the Board concluded that petitioner was "responsible" for the assaults, and that the assaults constituted an unfair labor

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[1]R. Vol. VI, p. 619; see also *id.* pp. 434, 545-546.
[2]R. Vol. I, p. 110.
[3]R. Vol. I, pp. 110, 163.

practice by petitioner (R. Vol. V, pp. 309, 315, 319), but it did not reveal the theory on which it reached such conclusions, and it made no findings of ultimate fact from which such conclusions would follow under the theory of *respondeat superior* urged in its briefs below[1] or under any other theory. The court below nevertheless sustained such conclusions and enforced the provisions of the order based thereon.

4. Throughout the hearing for the taking of evidence, the Trial Examiner openly manifested an unmistakable bias and prejudice in favor of the complaining union and against petitioner. He questioned interested and friendly U. A. W. witnesses with leading and sympathetic questions for the plain purpose of eliciting only such testimony as would help the Board's case.[2] He questioned petitioner's witnesses with

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[1]Of the ten individuals for whose acts petitioner was held "responsible", two are referred to in the findings merely as "foremen"; some as "service men"; and others merely as "employees" (R. Vol. V, pp. 314-315), with no other indication of the nature of their employment and no finding that the acts of any one of them, attributed to petitioner, were the kind he was employed to perform, or incurred substantially within the authorized time and space limits, or were actuated in any part by a purpose to serve petitioner (see Restatement of Agency, § 228). Indeed, the Board's emphasis upon the severity of some of the assaults, upon the nature of the injuries received, and upon the fact that most of the assaults took place on public highways, would weigh strongly against a finding that any of the individuals were acting within the scope of an employment by petitioner (*id.*, comments to §§ 229 and 235), even if, despite the extraordinary situation out of which the assaults arose, the doctrine of *respondeat superior* were strictly applicable in this proceeding under the Act.

[2]R. Vol. I, pp. 96-99, 117, 229-230, 285-286, 355-357, 372-375, 395-397, 438, 444, 455-456, 478-480, 503, 527, 544-546, 551, 559-561, 561-565, 585-586, 610-611, 696, 717-720, 749,

open hostility and contempt, subjecting them to cross-examination at least as bitter and unfair as the Board's own prosecuting attorneys.[1] He abused counsel for petitioner, arbitrarily discriminated against it in his rulings on evidence, unfairly restricted the scope of petitioner's examination to exclude relevant testimony which might be favorable to petitioner, and in various other ways sought to hinder and impede the presentation of petitioner's case.[2] His course of conduct throughout the hearing was plainly such as to induce Board witnesses to exaggerate and embroider their testimony, to intimidate witnesses called by petitioner and discourage them from giving testimony in its behalf, and to hinder and discourage petitioner's counsel in the presentation of petitioner's case.

Petitioner duly moved to suppress the evidence by reason of the Examiner's misconduct (R. Vol. V, p. 79),

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751-752, 754-755, 779-780; R. Vol. II, pp. 802-803, 805-806, 809, 828, 848-851, 871-872, 886-888, 903-904, 925-926, 942-943, 958-959, 969, 977, 1008-1010, 1019-1020, 1033, 1087-1089, 1139, 1158, 1193-1197, 1214-1216, 1240-1242, 1255-1257, 1272-1274, 1288-1290, 1301-1302, 1316-1318, 1319; R. Vol. III, p. 2032.

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[1]R. Vol. II, pp. 1386-1389, 1399-1401, 1440-1445, 1458, 1498-1502, 1525-1530, 1542; R. Vol. III, pp. 1564-1565, 1587, 1592-1593, 1650-1651, 1669-1670, 1678-1679, 1690, 1694, 1697, 1698, 1741, 1762, 1765, 1776, 1778-1780, 1856-1857, 1880, 1884, 1920-1921, 1944, 1985, 1993, 1995.

[2]R. Vol. I, pp. 46-47, 70, 130, 134-135, 136, 140, 141, 151, 152, 172, 177, 200-201, 205, 234, 287, 304-307, 308-309, 336, 367, 392, 527, 588-590, 599, 600, 600-601, 602, 637-638, 645, 647, 660, 695-696; R. Vol. II, pp. 818, 820, 863-864, 888, 944, 1012, 1019-1020, 1306, 1323, 1364, 1415, 1416-1429, 1430, 1441, 1443, 1452, 1453, 1457, 1458, 1469-1470, 1498; R. Vol. III, pp. 1553, 1564-1565, 1566, 1568, 1587, 1593, 1603-1604, 1622, 1650-1651, 1669-1670, 1690, 1693, 1694, 1695, 1696-1697, 1698, 1700, 1701, 1702, 1720, 1724, 1741, 1744-1745, 1746, 1748, 1763, 1776, 1801, 1808, 1843, 1854, 1860-1861, 1880, 1892, 1893, 1920-1921, 1955, 1975-1978, 2061, 2063.

and in its exceptions to the proposed decision directed the Board's attention again to such misconduct (R. Vol. V, pp. 86-89). The Board denied the motion, without opinion or explanation (R. Vol. V, p. 84), and overruled the exceptions (R. Vol. V, p. 288).

With respect to the Examiner's misconduct, the court below said that he

> "overstepped the bounds of that judicial propriety which contestants have a right to expect not only from the courts but from administrative tribunals, and is so conducive to public confidence in their adjudications, and that he manifested a peculiar concept of the nature of the judicial function he was called upon to exercise" (R. Vol. VI, p. 615).

The court below also recognized in its opinion "the inevitability of substantial prejudice [where "impropriety appears"], even though incapable of precise exposition" (R. Vol. VI, p. 616). It nevertheless declined to set the order aside by reason of the misconduct of the Trial Examiner.

5. In its answer and cross-petition in the court below petitioner alleged that the order was invalid by reason of failure of the Board itself to accord to petitioner a full and fair hearing and to reconsider the case as required by the order of remand[1] (R. Vol. VI, pp. 377-387). It alleged *inter*

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[1]The order of remand, affirmed by this Court, provided: "The motion of respondent [the Board] filed June 2, 1938, to remand this cause to the National Labor Relations Board for the purpose of setting aside its findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case, is granted." See transcript of record in *Ford Motor Co.* v. *N. L. R. B., supra,* at p. 108.

alia that the Board, without considering the evidence or petitioner's exceptions or brief, had adopted as its own a decision proposed by its subordinates without affording petitioner any opportunity to be heard thereon (R. Vol. VI, pp. 382-385); that, in reaching its decision, the Board and its subordinates relied upon *ex parte* information and reports received from persons who acted as prosecutors in the proceeding and from other persons and that in other respects the exercise of the Board's prosecuting and judicial functions were intermingled (R. Vol. VI, pp. 385-386); and that by press releases of the Board and public statements of a member of the Board and its general counsel the Board, prior to affording petitioner any purported hearing upon the proposals of its subordinates, revealed a fixed bias and prejudice against petitioner and a determination to accord to petitioner only the forms of a hearing for the purpose of making a formal record to sustain an order against petitioner (R. Vol. VI, pp. 379-381).

These allegations were substantially similar to those contained in petitioner's answer and cross-petition in the previous case, of which this Court said, in *Ford Motor Company* v. *National Labor Relations Board,* 305 U. S. 364, 372, that the grounds asserted were "sufficient for setting aside the order". In the exercise of its right to obtain a trial upon this justiciable issue, the petitioner made three motions in the court below:

(1) A motion to compel a reply, the purpose of which was, if possible to define and limit the issues by removing therefrom any undisputed issues of fact (R. Vol. VI, p. 401).

(2) Two motions to require the Board to supplement the record by certifying and filing with the

court, as a part of the record, all reports, findings and communications prepared for the use of the Board, or made to or received or considered by the Board or its subordinates, in deciding the case (R. Vol. VI, pp. 421, 561).[1] The purpose of these motions was to compel obedience to the statutory requirement that the whole record should be certified to the court, and also to limit and narrow the issues on the ultimate issue of a full and fair hearing by the incorporation in the record itself of such findings and communications.

(3) A petition to take the depositions of members of the Board and certain employees thereof who took part in the decision of the case or appeared to have knowledge of the matters alleged (R. Vol. VI, p. 601).

These motions were supported by an affidavit (R. Vol. VI, p. 558; see R. Vol. VI, p. 610) setting forth verbatim statements made by a member of the Board, and by competent persons friendly to the Board, purporting to be based upon statements made by members of the Board and its staff, descriptive of the procedure followed by the Board generally, and particularly of the functions and activities of its so-called review section (R. Vol. VI, pp. 567-568, 584-587). The affidavit also set forth verbatim extracts from press releases of the Board and statements made by a member of the Board and its general counsel, prior to the decision of the case by the Board, revealing both prejudgment and prejudice (R. Vol. VI, pp. 570-573, 587-590, 592-598).

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[1]Petitioner made a similar motion before the Board after oral argument and before decision (R. Vol. V, p. 281), which motion the Board denied (*id.*, p. 282).

The affidavit also set forth extracts from testimony given before a House Committee by members of the Board's review section, including one of the review attorneys in this case, descriptive of the procedure followed by the Board in the decision of cases, of the powers delegated by the Board to its subordinates, and of their use in their work of "informal files" and other prejudicial *ex parte* communications (R. Vol. VI, pp. 574-583, 598-601).

The statements contained in this material, made or endorsed by members of the Board and its staff, constituted *prima facie* support for the allegations of petitioner's answer and cross-petition, and constituted reasonable grounds for belief that the Board—doubtless through a misconception of its powers and the limitations thereon—had failed to accord to the petitioner that full and fair hearing required by the Act and the due process clause as defined in prior decisions of this Court and had failed to reconsider the case as required by the order of remand.

The court below overruled each of said motions. By so doing it effectively prevented petitioner from obtaining a trial upon the justiciable issue presented by allegations already declared by this Court to afford, if true, a sufficient ground for setting aside the Board's order.

6. It appeared from the record certified by the Board and filed with the court below that, whether or not the Board had delegated any of its functions to its subordinates, the purported findings and order of the Board, which bear at the end thereof the names of two of the three members of the Board (R. Vol. V, p. 359), were never considered and adopted by the Board as a board. The record filed with the Board's petition to enforce its first order

was certified to be "the entire record" of the proceedings before the Board (R. Vol. I, p. 1), and the supplemental record filed with the Board's petition to enforce its second order was certified to "constitute a fully [*sic*] and accurate record" of the proceedings had subsequent to the remand of the case to the Board (R. Vol. V, p. 1). The entire record as thus certified includes seven orders of the Board preliminary to its final decision and order on the merits of the case, each of which is preceded by a recital that the ruling set forth therein was made at a meeting of the Board, and stating the time and place of the meeting and the members of the Board present thereat.[1] Yet the entire record contains nothing whatever to indicate that the decision and order itself was ever adopted, or the case ever considered or decided on the merits, by the Board at any meeting thereof.

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[1]For example, immediately preceding the Board's purported decision and order is an order of the Board denying petitioner's motion to supplement the record as to the procedure of the Board, which order is prefaced as follows (R. Vol. V, p. 282):

> "At a regular meeting of the National Labor Relations Board, held at its office in the City of Washington, D. C., on the 18th day of May, 1939. Present:
>
> J. Warren Madden, Chairman,
> Edwin S. Smith."

Identical recitals precede (1) Order transferring the proceeding to the Board (R. Vol. III, p. 2093); (2) Order setting aside the Board's first decision and order (R. Vol. V, p. 5); (3) Order directing the issuance of proposed findings (R. Vol. V, p. 6); (4) Order denying motion to suppress evidence taken before the examiner (R. Vol. V, p. 84); (5) Order denying motion to permit further evidence to be adduced (R. Vol. V, p. 269); and (6) Order granting permission to Ford Brotherhood of America, Inc., to file brief (R. Vol. V, p. 273).

Despite this state of the record and the failure of the Board to supplement the record with any showing that its order was made at a meeting of the Board (although it had supplemented the record to supply other deficiencies therein[1]), the court below enforced the order and thus, although its opinion is silent on the matter, in effect held that it is unnecessary that the Board as a board give consideration to the issues involved in the case, but that it is sufficient if two of the three members thereof subscribe their names to a purported decision and order not adopted at any meeting of the Board.

SPECIFICATION OF ERRORS

The errors which petitioner will urge if the writ of certiorari be granted are that the Circuit Court of Appeals for the Sixth Circuit erred:

1. In enforcing the Board's order, as modified.

2. In refusing to hold that the discharge of the 23 men (ordered to be reinstated by the Board's order, as modified) because of their membership in, activity on behalf of, or sympathy with, an organization which petitioner had reason to apprehend would attempt to seize petitioner's plant by force and violence did not constitute an unfair labor practice.

3. In refusing to set aside the Board's order on the ground that the Board failed to consider facts and circumstances required to be considered.

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[1]R. Vol. I, p. 4; R. Vol. V, p. 361.

4. In refusing to set aside the Board's order, in so far as based upon the conclusion that petitioner was responsible for assaults, upon the ground that the Board's findings failed to embrace the basic facts needed to sustain such conclusion or to reveal the theory on which such conclusion was reached.

5. In refusing to set aside the Board's order on the ground that petitioner was denied a full and fair hearing by reason of the misconduct of the Trial Examiner.

6. In holding, in effect, that petitioner's allegations as to the Board's procedure in reaching its decision failed to allege facts sufficient for setting aside the Board's order and failed to raise a justiciable issue which it was the duty of the court to decide.

7. In denying petitioner's motion for an order directing the Board to reply to the affirmative allegations of petitioner's answer and to answer the affirmative allegations of petitioner's cross-petition.

8. In denying petitioner's motion for an order directing the Board to supplement the record.

9. In denying petitioner's motion for an order directing the Board to certify and file additional parts of the record.

10. In denying petitioner's petition for a commission to take the depositions of witnesses.

11. In refusing to set aside the Board's order by reason of the failure of the Board to consider and adopt its decision and order at a meeting of the Board.

12. In refusing to set aside the Board's order by reason of the Board's publicly revealed prejudgment of the issues and failure to "reconsider" the case as required by the order of remand.

QUESTIONS PRESENTED

1. Whether it is an unfair labor practice for an employer to discharge employees because of their membership in an organization which the employer has reasonable grounds to apprehend will attempt to seize his plant by force and violence in order to inaugurate a sit-down strike.

2. Whether upon review of an administrative order the reviewing court, upon finding that the administrative body has failed to consider material facts and circumstances which it should have considered, may nevertheless enforce the administrative order if it appears to the court that the administrative findings are "supported by evidence."

3. Whether an employer may be held to have engaged in unfair labor practices by reason of unlawful acts of his employees, where the Board has made no basic findings of fact or revealed no theory to support its conclusion that such acts constituted an unfair labor practice by the employer.

4. Whether a sustained course of misconduct by a Trial Examiner, such as occurred in this case, constitutes a denial of a full and fair hearing.

5. Whether allegations such as petitioner has made with respect to the Board's procedure in reaching its de-

cision in this case, where supported by a showing of reasonable grounds for such allegations, are sufficient, if shown to be true, for setting aside the Board's order and raise a justiciable issue; and, if so, whether, in a proceeding to review such order, the court may refuse to grant any interlocutory relief to bring about a determination of such issue.

6. Whether the Board may make a decision and issue an order by the action of two of its members, not taken at any meeting of the Board.

7. Whether a full and fair hearing, as required by the Act and due process of law, is denied, and a court order requiring an administrative body to reconsider an entire case is violated, where, by public press releases and statements by and on behalf of such body prior to any such reconsideration, it reveals a prejudgment of the issues in the case and a determination to grant the forms of a hearing only in order to make a record to sustain an order against the respondent in the proceeding.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. That part of the Board's order, sustained by the court below, of the most immediate public importance, is the requirement that petitioner reinstate with back pay the 23 out of petitioner's 80,000 employees found by the Board to have been discharged in 1937 for union activity or membership.

The question is of importance not because of the number of men or the amount of back pay involved, but by reason of the principle involved. Petitioner's witnesses testified before

the Board that these men were discharged, not for union activity or membership, but for poor workmanship, fighting, failure to report to work, and other misconduct. The Board, however, found differently, and the court below found the evidence sufficient to sustain the findings made. The U. A. W., to which these men belonged, was then committed to a sit-down strike policy, which it had carried out with violence in other automobile plants in the Detroit district and had threatened to use against petitioner. The court below found that petitioner's apprehensions that the union would employ a sit-down strike against petitioner and attempt the forcible seizure of its plants were well grounded. (See *supra,* pp. 4-6). The question is therefore presented whether an employer may discharge employees belonging to an organization committed to such a policy and making such threats, as a measure of protection, or whether he must sit idly by and permit the union to attempt, if not accomplish, the seizure of his plant by force and violence.

In *N. L. R. B.* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240, 253, this Court described such strikes as illegal, and said that to condone them "would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society." It sustained the right of the employer to discharge persons who had participated in such a strike.

In *Peninsular & Occidental S. S. Co.* v. *N. L. R. B.,* 98 F. (2d) 411 (C. C. A. 5), sit-down strikes had occurred on two of the Company's ships, but the dispute had been settled, and the ships had resumed their regular schedules, after which the entire crews of both ships were discharged. The court set aside an order of the Board directing their reinstatement, upon the ground that apprehensions of re-

newed sit-down strikes constituted a valid ground for discharge.[1]

On the facts recited, it is believed that the opinion of the court below is in conflict with the decisions of this Court and of the Circuit Court of Appeals for the Fifth Circuit cited above. See also *Associated Press* v. *N. L. R. B.*, 301 U. S. 103, 132; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 482. If not, the court below decided an important question of Federal law which should be settled by this Court. The right of an employer to take precautions against violent seizure of his property or the use of sit-down or slow-down strikes inside the plant is of particular importance in the present national emergency.

2. In enforcing the Board's order and denying petitioner's petition to adduce additional evidence, although the Board had failed to consider facts and circumstances required to be considered because material to the issues presented and had excluded evidence and rejected offers of proof thereof, and although the court itself was without power and did not purport to weigh and appraise the evidence *de novo* in the light of the facts and circumstances which the Board disregarded, the court below decided an important question of Federal law in a way probably in conflict with decisions of this Court wherein it was held that where an administrative tribunal failed to consider material facts and circumstances, its order should be

[1]The court in that case held that evidence ignored by the Board showed apprehension on the part of the Company of further sit-downs. In the instant case the court below has held that the petitioner's apprehensions that the U. A. W. would stage a sit-down strike at its plant and attempt its forcible seizure were well grounded.

set aside and the case remanded to such tribunal for further consideration. *St. Louis & O'Fallon Ry. Co.* v. *United States,* 279 U. S. 461, 487; *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 239; *West* v. *Chesapeake & Potomac Telephone Co.,* 295 U. S. 662, 674; *Chicago, M. & St. P. Ry. Co.* v. *Public Utilities Commission of Idaho,* 274 U. S. 344, 352; *Northern Pacific Ry. Co.* v. *Department of Public Works of the State of Washington,* 268 U. S. 39, 45; *Chicago Junction Case,* 264 U. S. 258, 265. Indeed, it is elemental that the finding of ultimate facts, after consideration of all material facts and circumstances, is for the administrative tribunal and not for the court. By the course pursued, the court below deprived petitioner of its right to have the issues determined upon a weighing and appraisal of all material facts and circumstances and to adduce evidence as to such facts and circumstances.

3. In sustaining the Board's conclusion that petitioner engaged in an unfair labor practice by reason of the assaults committed by certain of its employees, although the Board had eliminated its previous finding that petitioner had planned such assaults and although the Board had made no basic findings of fact to support its conclusion and had revealed no theory by which its conclusion could be sustained, the court below decided an important question of Federal law in a way probably in conflict with the decisions of this Court in *Florida* v. *United States,* 282 U. S. 194, 215; *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U. S. 74, 86; *United States* v. *Chicago, M. St. P. & P. R. Co.,* 294 U. S. 499, 510-511; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 295 U. S. 193, 201-202. In those cases

this Court set aside administrative orders because of disregard of the fundamental requirement that "findings based on the evidence must embrace the basic facts which are needed to sustain the order" (*Morgan* v. *United States,* 298 U. S. 468, 480; see *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 74.) If the action of the court below was not so in conflict, it decided an important question of Federal law which has not been but should be settled by this Court.

4. In failing to hold that the Examiner's misconduct constituted a sufficient ground for setting aside the order, the decision of the court below is in conflict with the decisions of the Circuit Court of Appeals for the Seventh and Eighth Circuits in *Inland Steel Co.* v. *N. L. R. B.,* 109 F. (2d) 9, and *Montgomery Ward & Co.* v. *N. L. R. B.,* 103 F. (2d) 147. In those cases, as in this case, the Examiner did not participate in the decision. Those courts nevertheless set the order aside by reason of the "inevitability of substantial prejudice" (arising from misconduct of the Examiner, substantially similar to that disclosed in this case), even though "incapable of precise exposition", a doctrine which the court below recognized (R. Vol. VI, p. 616) but failed to follow. The grounds upon which the court below seeks to distinguish between these cases are untenable, or if not, at least raise such doubt as to justify this Court in assuming jurisdiction for the purpose of bringing the decisions of the several Circuits into harmony.

The decision of the court below is also in probable conflict with the decisions of this Court in *Ohio Bell Telephone Company* v. *Public Utilities Commission,* 301 U. S. 292, 304-305; *Tumey* v. *Ohio,* 273 U. S. 510, 522; and *Jordan* v. *Massachusetts,* 225 U. S. 167, 176.

In *Ohio Bell Telephone Co.* v. *Public Utilities Commission, supra,* this Court ruled that the exemption of administrative tribunals from "supervision" in the "realm of administrative discretion" makes it all the more essential that in proceedings before such tribunals the " 'inexorable safeguard' * * * of a fair and open hearing be maintained in its integrity", a principle with which this Court said "there can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

As stated by the court below (R. Vol. VI, p. 615), the Examiner "overstepped the bounds of * * * judicial propriety" required to be exercised not only by the courts but by "administrative tribunals", and "manifested a peculiar concept of the nature of the judicial function he was called upon to exercise", giving rise to the inevitability of substantial prejudice hereinbefore noted and referred to by the court. Indeed, as stated by the court below, the Board itself did not "condone his lapses" (*id.,* p. 615). In failing to set the decision aside by reason of such misconduct running through the entire hearing, the court below failed to apply the principles recited by this Court in the cases cited.

If the decision of the court below is not in conflict with the decisions cited above, that court, in failing to hold that the Examiner's misconduct constituted sufficient ground for the setting aside of the order, sanctioned such a departure by the Board from the accepted and usual course of judicial proceedings and the fundamental requirements thereof, as to call for the exercise of this Court's power of supervision.

5. In denying (a) petitioner's motion to compel a re-ply to its answer and cross-petition, (b) petitioner's two notions to supplement the record, and (c) petitioner's peti-ion to take depositions, the action of the court below was n probable conflict with the decisions of this Court in *Morgan* v. *United States,* 298 U. S. 468, 304 U. S. 1 (re-earing denied, 304 U. S. 23), and in *Ford Motor Co.* v. *N. L. R. B.,* 305 U. S. 364. See also *Ohio Bell Telephone Co.* v. *Public Utilities Commission, supra.* If not in con-flict with the foregoing decisions, the court below in thus disposing of petitioner's motions decided an important ques-ion of Federal law which should be settled by this Court, nd so far departed from the accepted and usual course of udicial proceedings as to call for an exercise of this Court's ower of supervision.

The ultimate facts set forth in those allegations of etitioner's answer and cross-petition in which it alleged that he Board had failed to accord to it that full and fair hear-ng required by the Act and by the Fifth Amendment were ubstantially similar to the ultimate facts pleaded in *Morgan . United States, supra,* in which this Court held that the ailure of the court below to accord to the appellants in that ase a trial on the issue raised thereby constituted error. he specific allegations in this case are also substantially the me as those contained in the answer and cross-petition petitioner in *Ford Motor Co.* v. *N. L. R. B., supra,* hich this Court stated set forth grounds "sufficient for tting aside the order". The effect of the action of the wer court was thus to deny to petitioner a trial upon sues twice declared by this Court to be justiciable and to quire trial.

The allegations to which the motions and petition were rected, although made on information and belief, as they

were of necessity required to be, and as they were in the two cases hereinbefore cited, were supported by an affidavit containing statements emanating directly or indirectly from members of the Board and its employees, including sworn testimony before a Congressional Committee, which afforded probable cause for the information and belief upon which such allegations were made (see *supra,* pp. 13-14). By the motions made, petitioner sought to reduce to a minimum the interference with administrative process (1) by moving to compel a reply, which, if granted, would have limited and defined the issues to those allegations of fact controverted by such reply; (2) by moving to supplement the record by the certification of such additional documents or material as the Board may have considered in its determination of the case; (3) by petition to take depositions, the scope of which —had the other motions been granted—would have been limited to the controverted issues of fact remaining.[1]

The rights protected by the several decisions in the *Morgan* case are fundamental rights and, as stated therein, the requirements of a full and fair hearing are requirements of substance and not of form. Unless the requirements of that case and the observations thereafter made

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[1]All of these motions were within the power of the court to grant and were appropriate to bringing about a determination of the issues presented. See *Ford Motor Co.* v. *N. L. R. B.,* 305 U. S. 364, 373; *Morgan* v. *United States,* 298 U. S. 468, 482; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 73; *N. L. R. B.* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 47; Revised Statutes, § 716, 28 U. S. C. § 377; Revised Statutes § 866 *et seq.,* 28 U. S. C. § 644 *et seq.* The denial of each and all of these requests for interlocutory relief can be explained only on the ground that the court erroneously entertained the belief that petitioner's allegations raised no justiciable issue.

by this Court in *Ford Motor Co.* v. *N. L. R. B.* are to become mere empty words, this Court should assume jurisdiction for the purpose of reviewing action by the court below, which had the effect of denying to petitioner a trial of justiciable issues upon a showing of the existence of probable cause.

6. In failing to hold that the Board's order should be set aside by reason of the Board's failure to consider the order and the findings of fact at a meeting of the Board, the Board decided an important question of Federal law which has not been but should be settled by this Court,[1] and sanctioned such a departure from the accepted and usual course of quasi-judicial administrative proceedings as to call for an exercise of this Court's power of supervision.[2]

The powers conferred upon the Board are conferred upon the Board as a board, not upon its members acting

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[1]The state courts have uniformly held that the powers conferred upon an administrative board may be exercised only at a meeting of such board. *Lawler* v. *Brennan*, 150 Wisc. 115, 136 N. W. 1058; *State* v. *Schuffenhauer*, 213 Wisc. 9, 250 N. W. 767; *P. & F. R. Ry. Co.* v. *Commissioners of Anderson County*, 16 Kan. 302; *Tarrant County* v. *Smith*, 1 S. W. (2d) 537 (Texas Civ. App.); *State* v. *Alexander*, 58 Miss. 557, 130 So. 754; *Prater* v. *Abernathy*, 160 Miss. 51, 134 So. 168; *Johnson* v. *Mayor and City Commission*, 4 La. App. 40, 129 So. 433; *Strong* v. *The District*, 4 Mackey 42 (D. C.); *Village of Bellwood* v. *Galt*, 321 Ill. 504, 152 N. E. 591; *Pugh* v. *School District*, 114 Mo. App. 688, 91 S. W. 471; *Gaston* v. *Ackerman*, 6 N. J. Misc. 694, 142 Atl. 45; *The People* v. *Walker*, 23 Barb. 304 (N. Y.).

[2]Thus, each order issued by the Interstate Commerce Commission, the Federal Trade Commission, the Federal Communications Commission, and the Securities and Exchange Commission shows upon its face that it was made and entered at a meeting of the Commission. See such orders as reported in the Federal Register.

individually. In contrast with all preliminary action taker in the case, much of which was of a purely routine char acter, the record of the proceedings by the Board shows n consideration of its findings and order, at any session of th Board (see *supra,* p. 15). Such course of conduct woul appear to be contrary to the requirements of the Act an certainly constitutes a departure from recognized practic and procedure of other administrative tribunals.

7. In refusing to hold that the Board's bias and preju dice against petitioner and its prejudgment of the cas prior to hearing evidence or argument, as manifested by th press releases of the Board and the public statements o one of its members and its general counsel were such a to require the Board's order to be set aside on the groun (1) that the Board failed to reconsider the entire case a required by the order of remand and (2) that petitione was denied a full and fair hearing, the court below decide an important question of Federal law in a way probably i conflict with the applicable decisions of this Court in *For Motor Co.* v. *N. L. R. B.,* 305 U. S. 364, 376; *Morgan* v *United States,* 304 U. S. 1, 15; *Tumey* v. *Ohio,* 273 U. S 510, 522; *Jordan* v. *Massachusetts,* 225 U. S. 167, 176; an *Ohio Bell Telephone Company* v. *Public Utilities Commis sion,* 301 U. S. 292, 304. As stated in *Jordan* v. *Massachu setts* (p. 176), "Due process implies a tribunal both impar tial and mentally competent to afford a hearing", and i *Tumey* v. *Ohio* (p. 525), "No matter what the evidenc was against him, he had the right to have an impartia judge." And in affirming the order of remand of the pro ceeding to the Board for a "reconsideration of the entir case", this Court said that "What findings or order woul

thus [after the remand] be made became a matter of conjecture * * *", thus indicating that the proceedings to be taken by the Board were not to be a mere matter of form having as their predetermined purpose the issuance of a second decision and order adverse to petitioner after the making of a record which, in the opinion of the Board and its staff, would sustain such a decision and order.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio, commanding that court to certify and send to this Court, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, *No. 8399, National Labor Relations Board, Petitioner,* v. *Ford Motor Company, Respondent,* to the end that said cause may be reviewed and determined by this Court; that paragraphs 1 and 5 of the decree of said court referred to at page 1 hereof be set aside and reversed; and that petitioner be granted such other and further relief as to this Honorable Court may seem just and proper.

Dated, New York, N. Y., December 30, 1940.

FREDERICK H. WOOD,
ALFRED MCCORMACK,
Attorneys for Petitioner,
Ford Motor Company.

I. A. CAPIZZI,
HARMON DUNCOMBE,
Of Counsel.